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Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio (Daimler-Chrysler Corporation) and Brian J. Thomas

Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio (Ford Motor Company) and Bradford D. Zelasko. Cases 8–CB–8858 and 8–CB–9003

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On August 30, 2000, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and Charging Party Brian J. Thomas filed exceptions. Thereafter, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to Charging Party Thomas' exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

As part of his remedy, the judge recommended that the Respondent rescind the unlawful fines imposed on Ronald Apple, Brian Thomas, Thomas Whitcomb, and Robert Wilhite because the formula that the Respondent utilized to calculate these fines included, in all cases,

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge found that the Respondent violated Sec. 8(b)(1)(A) by fining Robert Wilhite and Thomas Whitcomb for their conduct in working for nonsignatory employers until April 12, 1998, when these employees each tendered his *second* resignation letter to the Respondent. The record shows, however, that both employees previously resigned their union memberships in February (Wilhite on February 13 and Whitcomb on February 15). Although the Respondent has now conceded that Wilhite and Whitcomb had resigned in February, it is unclear whether the fines the Respondent imposed on them fully reflect their earlier resignation dates. Nevertheless, based on the evidence that each employee worked only about 1 week before resigning from the Union, we find that the Respondent's fining of Wilhite and Whitcomb violated Sec. 8(b)(1)(A) in any event because the Respondent's 1-year liquidated damages formula necessarily included postresignation periods.

³ We shall provide a new notice to include a statement of employee rights under the Act as set forth in *Ishikawa Gasket America*, 337 NLRB No. 29 (2001).

periods of time after they had resigned their union memberships.⁴ The Respondent has excepted, inter alia, to the judge's recommended Order to rescind the fines, arguing that the Board's decision in *Newspaper Guild Local 3 (New York Times)*, 272 NLRB 338 (1984), requires that the Board apportion the fines by ordering rescission of "only the portion of the fine which is attributable" to the postresignation period and therefore unlawful. In adopting the judge's recommended Order, we stress that, based on the method that the Respondent used to calculate the fines, there is no reasonable basis on this record to apportion the fines that the Respondent imposed on these individuals between the preresignation period and the postresignation period.

Contrary to the Respondent and our dissenting colleague, we find that the Board's decision in *Newspaper Guild Local 3* is distinguishable from the present case.⁵ *Newspaper Guild Local 3* involved union fines assessed against members who crossed the picket line during a strike. The Board decided that it would leave to compliance the apportionment of the fines based on the date that each striker crossed the picket line. The Respondent in this case did not solely calculate the fines it imposed using the 1-year period it applied—albeit unlawfully—with respect to each of these four employees. If the Respondent had used only this method, it may have been possible to pro rate the fines according to the actual number of days that each discriminatee worked for the nonsignatory employer as our colleague claims is appropriate. However, as the Respondent itself specifically stated in its trial committee decision involving Thomas' fine:

The formula is based on the loss to the Union and the entire Union membership during a one-year period of time *in combination with other factors*, which may mitigate or increase the amount of the union disciplinary fine. [Emphasis added.]

These *other factors* included increasing the fines by \$200 for each year of service that the employees had worked under a union contract and by \$2000 for their last 6 years of service with signatory employers. The Respondent then multiplied these amounts by three in order to penalize these individuals for each of the three constitutional provisions that they had allegedly violated. By contrast, there is no showing that *Newspaper Guild Local 3*

⁴ The judge also rescinded the fine imposed on Anthony Ganelli whom the judge found, unlike these other four individuals, had resigned before his conduct in working for a nonsignatory employer that the Respondent claimed violated its constitution and bylaws.

⁵ Member Cowen agrees that *Newspaper Guild Local 3* is distinguishable from the instant matter, and expresses no view on the continued validity of that decision.

involved this many different steps in calculating the fines. There, the Region in compliance could determine the date that each striker crossed the picket line and then apportion the fine among the lawful preresignation period.

Our goal in remedying the unfair labor practice violations the Respondent has committed here is to restore the status quo ante.⁶ We find that, in the present case, it is impossible to apportion the Respondent's fines in a lawful manner with any degree of certainty. Our colleague's belief that the fines can be apportioned on a daily basis is erroneous in this context given the multifaceted method the Respondent utilized in determining these fines. Indeed, the Respondent has not proposed any specific method for making these calculations that would encompass all the factors on which it based the existing fines. For these reasons, we resolve the uncertainty of determining the lawful portion of these fines against the Respondent, which calculated the fines and created the uncertainty.⁷ Accordingly, we order the Respondent to rescind the unlawful fines it imposed on Apple, Thomas, Whitcomb, and Wilhite.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, its officers, agents, and representatives shall take the action set forth in the Order.

Substitute the attached notice for that of the judge.

Dated, Washington, D.C. September 30, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

⁶ *Allied Products Corp.*, 218 NLRB 1246 (1975), enf'd. 548 F.2d 644 (6th Cir. 1977).

⁷ See, e.g., *Ryder System*, 302 NLRB 608 (1991), enf'd. 983 F.2d 705 (6th Cir. 1993); *Kansas Refined Helium Co.* 252 NLRB 1156, 1157 (1980), enf'd. 683 F.2d 1296 (9th Cir. 1982).

For similar reasons, contrary to our dissenting colleague, we also adopt that portion of the judge's remedy requiring the Respondent to reimburse Thomas for all of his reasonable expenses and legal fees in defending against the Respondent's State court lawsuit to collect the fine.

In contrast to my colleagues, I would not order rescission of the fines at issue here. Instead, consistent with *Newspaper Guild Local 3 (New York Times)*, 272 NLRB 338 (1984), I would permit the Respondent, at the compliance stage of this proceeding, to demonstrate a reasonable method of apportioning the fines imposed on Apple, Thomas, Whitcomb, and Wilhite between preresignation conduct (a lawful basis for the fines) and postresignation conduct (an unlawful basis).

My colleagues, agreeing with the judge, assert that there is "no reasonable basis on this record to apportion the fines." But neither the majority, nor the judge justify this conclusion or explain why the Respondent should not have the chance to supplement the record. Here, in fact, the Respondent's brief in support of its exceptions has suggested a seemingly reasonable method of apportionment: modifying the liquidated-damages formula used so that fines are calculated not on a 1-year basis, but on a daily basis linked to the employees' resignation dates. The General Counsel's answering brief, in turn, does not argue that such a recalculation would be unreasonable. Instead, the General Counsel maintains that the Board should not itself reapportion the fines, but rather should permit the Respondent to reconsider the matter, by rescinding the fines. Permitting the Respondent to raise the issue in compliance seems entirely consistent with the General Counsel's view.¹

Similarly, because the fine imposed against Thomas was based on both preresignation and postresignation conduct, I would not adopt the judge's remedy requiring the Respondent to reimburse Thomas for all of his reasonable expenses and legal fees in defending against the Respondent's State court lawsuit to collect the fine. Rather, the Respondent should be liable only for those fees and expenses attributable to defense of the lawsuit insofar as it sought to collect an unlawful fine. Accordingly, I would allow the Respondent, in compliance, to seek to establish that some portion of Thomas' fees and

¹ My colleagues argue that the Respondent's use of length of service under union contracts and with signatory employers in determining the amount of the fines makes it "impossible" for the Respondent to revise the fines in compliance to rely only on the employees' preresignation conduct. The majority also attempts to distinguish the Board's decision in *Newspaper Guild Local 3*, supra (which provides for such determinations to be resolved in the compliance stage) on the basis that that case involved a less complicated fining method. Both arguments are inapposite because here the Respondent has offered to simplify its method to one linked to the employees' resignation dates. Moreover, in *Newspaper Guild Local 3*, the Board left the determination of the proper amount of the fine to the compliance stage although the record did not clearly establish such basic facts as when each employee crossed the picket line. 272 NLRB at 338 fn. 4. The majority has presented no reason why any similar deficiencies in the Respondent's fining procedure could not also be determined in the compliance stage.

expenses would have been incurred regardless of the illegal objective of the suit.

Dated, Washington, D.C. September 30, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and
protection

Choose not to engage in any of these protected activities.

WE WILL NOT fine employees for conduct that they engaged in after they had resigned from membership in our organization.

WE WILL NOT institute and maintain a lawsuit to compel payment of the unlawful fines.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the fines that we imposed on Ronald Apple, Anthony Ganelli, Brian Thomas, Thomas Whitcomb, and Robert Wilhite, and remove any reference to those fines from our files, and WE WILL, within 3 days thereafter, notify them in writing that this has been done.

WE WILL reimburse Brian Thomas for all reasonable expenses and legal fees he incurred in defending the lawsuit filed to compel payment of the fine, with interest.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33 OF
NORTHERN OHIO

Stephen Wilson, Esq., for the General Counsel.

Richard P. James, Esq., (*Allotta & Farley CO., L.P.A.*) of
Toledo, Ohio, for Respondent.

Bradford D. Zelasko, Esq. (*Jeffries, Kube, Forrest & Monteleone CO., L.P.A.*) of Cleveland, Ohio, for the Charging Parties in case 8-CB-9003.

Barry F. Hudgin, Esq. (*Schnorf & Schnorf CO., L.P.A.*) of
Toledo, Ohio, for the Charging Party in case 8-CB-9003

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Cleveland, Ohio, on June 30, 2000. The charge and amended charge in Case 8-CB-8858 were filed March 15 and May 17, 1999,¹ respectively. The charge in Case 8-CB-9003 was filed October 27. An order consolidating cases, amended consolidated complaint and notice of hearing (the complaint) issued on January 31, 2000. The complaint alleges that Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio (Respondent) violated Section 8(b)(1)(A) of the Act by imposing a fine on certain named individuals for conduct they engaged in after they had resigned from membership in Respondent. The complaint also alleges that Respondent violated the same section of the Act by filing a lawsuit against one of the individuals to compel payment of the fine. Respondent filed a timely answer that denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Daimler-Chrysler Corporation, a corporation, has been engaged in the manufacture and assembly of automobiles and trucks with a facility in Perrysburg, Ohio. Daimler-Chrysler annually sells and ships goods valued in excess of \$50,000 directly from that facility to points located outside the State of Ohio. At all times material Ford Motor Company, a corporation, has been engaged in the manufacture and assembly of automobiles and trucks with a facility in Brookpark, Ohio. Ford annually sells and ships goods valued in excess of \$50,000 directly from that facility to points located outside the State of Ohio. Respondent admits and I find Daimler-Chrysler and Ford are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Case 8-CB-8858

The parties reached a written stipulation of facts in this case. Brian Thomas had been a member in good standing with Respondent for about 21 years. On about July 6, 1998, Thomas secured a job with Daimler-Chrysler at its Perrysburg, Ohio facility performing sheet metal work. Daimler-Chrysler does

¹ All dates are in 1999 unless otherwise indicated.

not have a collective-bargaining relationship with Respondent covering sheet metal work. Thomas continued to be a member in good standing with Respondent until September 16, 1998, when he resigned from membership.

On August 11, 1998, Respondent sent Thomas a notice charging that he was in violation of its constitution and bylaws by working for a nonsignatory employer. On September 10, 1998, Respondent sent Thomas a letter advising him that Respondent's trial committee would hear the charges against him on November 7, 1998. As indicated, on September 16, 1998, Thomas resigned from membership in Respondent.

Thomas did not attend the trial on the charges against him. Respondent's trial committee found Thomas guilty of all the charges brought against him and imposed a fine on him in the amount of \$25,103.57. This fine was calculated based on the contributions that would have been made to Respondent had Thomas worked for a union employer. The trial committee's decision stated:

After the Trial Committee found Brother Thomas guilty of the charges, the Trial Committee utilized a liquidated damages formula for determining the amount of the union disciplinary fine. In a case such as Brother Thomas's, where a union member goes to work for a nonsignatory contractor performing work within the jurisdiction of the Union, the Trial Committee uses a one year period of time to calculate the liquidated damages formula. The formula is based on the loss to the Union and the entire Union membership during a one-year period of time in combination with other factors, which may mitigate or increase the amount of the union disciplinary fine.

Significantly, these calculations were based on hourly rates for a 1-year period.

After Thomas failed to pay the fine Respondent filed suit in Lucas County, Ohio, Court of Common Pleas. The suit sought to require Thomas to pay the fine. Thomas obtained legal counsel to defend against the lawsuit and has incurred legal fees in the process. After the charge in this case was filed the parties agree to the stay the State court proceeding.

B. Case 8-CB-9003

1. Anthony Ganelli

Anthony Ganelli had been a member of Respondent for about 17 or 18 years. On February 8 Ganelli began working for Ford at its Brookpark, Ohio facility performing sheet metal work. Ford does not have a collective-bargaining relationship with Respondent covering sheet metal work. Before starting his employment with Ford Ganelli had a conversation with Alan Chermak, Respondent's business manager, on February 1. Ganelli asked Chermak if he could obtain a withdrawal card from Respondent. Chermak asked where Ganelli was going. After some reluctance, Ganelli disclosed that he would be working for Ford beginning the following week. Chermak said that he would not give Ganelli a withdrawal card and that Ganelli would have to resign. Chermak said that he needed a written resignation.² Ganelli said that he would type a written res-

² The General Counsel does not allege that this requirement was unlawful.

ignation and mail it to Respondent. Chermak agreed, however, to hold the resignation in abeyance for 90 days just in case Ganelli did not complete the 90-day orientation period at Ford.³

Ganelli then prepared two handwritten letters and his girlfriend typed them. Ganelli signed the letters and his girlfriend mailed them to Respondent.⁴ The first letter, dated February 2, and addressed to Chermak, read in pertinent part:

I appreciate you taking the time to meet with me concerning my pending acceptance of employment with the Ford Motor Company. Enclosed is a letter of resignation that, through mutual agreement, will be held by you until I clear my initiation period of 90 days at Ford.

The official date we agreed that this letter will be held will be May 10th, 1999. This letter is only to become public information if someone questions my employment prior to May 10th, 1999.

The second letter, undated, indicated that Ganelli had resigned from Respondent.

On February 11, Respondent sent Ganelli a letter charging him with violating its constitution by working for a nonsignatory employer. However, on February 12, 1 day before Ganelli received the February 11 letter, Ganelli had a conversation with William Gambatese, Respondent's business agent. Gambatese told Ganelli that Ganelli had been brought up on charges. Ganelli said that Gambatese could not do that because he had already resigned. Gambatese replied that he already had brought charges against Ganelli. Ganelli then drove to Respondent's union hall and prepared another letter of resignation and handed it to Chermak.⁵

A hearing was held on the charges against Ganelli on May 8; Ganelli attended the hearing. On June 9 Ganelli was advised by letter that Respondent had decided to fine him \$62,164.35 for working for a nonsignatory employer. The trial committee report read:

³ Although Chermak did not testify in this proceeding, a transcript of Ganelli's hearing before Respondent's trial committee reveals that Chermak essentially agreed with Ganelli's testimony in this regard. Dennis Talbot, Respondent's financial secretary, testified that he overheard part of a conversation that occurred between Chermak and Ganelli; he claimed that this occurred on February 5. I note, however, that Respondent did not call Chermak to corroborate Talbot's testimony and Talbot admitted that he did not hear the entire conversation between Ganelli and Chermak. Under these circumstances I conclude that Ganelli's testimony is more credible.

⁴ These facts are based on the testimony of Ganelli and Denise Kushnar. I have taken into account that at his hearing before a trial committee Ganelli stated that he mailed the letters. However, in this proceeding Kushnar testified that she mailed them and Ganelli corroborated this. Based on my observation of their demeanor as well as the inherent probabilities, I conclude that their testimony is credible. Talbot testified that "there is absolutely no possibility and no chance" Respondent received Ganelli's letters. However, as seen below Talbot admitted overlooking other resignation letters that had been mailed to Respondent. Under these circumstances I do not credit his testimony on this matter.

⁵ These facts are based on the credible testimony of Ganelli. Talbot admitted that Respondent received this resignation letter.

After the Trial Committee found Brother Ganelli guilty of the charges, the Trial Committee utilized a liquidated damages formula for determining the amount of the union disciplinary fine. In a case such as Brother Ganelli's where a union member's affiliations and actions destroy the ability of the union to service, enforce, protect, and freely expand its ideals, beliefs, and membership, the Trial Committee uses a one-year period of time to calculate the liquidated damages formula. The formula is based on the loss to the entire union membership during a one year period of time in combination with other factors which may mitigate or increase the amount of the union disciplinary fine.

The fine was calculated based on hourly amounts for a 1-year period. This totaled \$20,721.45. The trial committee decided that Ganelli should be fined that amount for each of three sections of the constitution that he allegedly violated.

By letters dated June 21 and July 14, Respondent advised Ganelli that it had decided to reconsider and review the fine that it had assessed against him. On September 21, Respondent notified Ganelli that it had reconsidered the matter and had decided to fine him \$58,753.20. The trial committee report indicated that the amount was calculated based on several factors. First, the report acknowledged that Ganelli had resigned on February 12, when he handed his resignation to Chermak. Because Ganelli had worked for a week before he resigned, he was fined for the amount a journeyman would have earned for working 40 hours. This amounted to \$1394.80. The committee decided to triple this amount because it concluded that Ganelli had willfully violated Respondent's rules. It also decided to fine Ganelli \$200 for each of his 17 years of service working under a union contract for each of the three sections of the Respondent's constitution that he allegedly violated. Finally, the trial committee decided to fine Ganelli another \$2000 per year for his last 6 years of service for each of the three alleged violations.

2. Robert Wilhite

Robert Wilhite had been a member of Respondent for about 15 years. Wilhite began working for Ford on February 8 performing sheet metal work. By letter dated February 12, Respondent charged him with violating its constitution by working for a nonsignatory employer. The next day Wilhite called Gambatese and asked what his alternatives were. Gambatese replied that Wilhite should have resigned but that he was not sure that Respondent was going to accept the resignation. That same day Wilhite prepared a letter of resignation and faxed it to Respondent.⁶ On advice of counsel Wilhite sent another resignation letter to Respondent on April 12.

Like Ganelli, Wilhite was advised of the trial scheduled for May 8. By letter dated June 9, Respondent notified Wilhite that it had fined him \$65,923.56 for working for a nonsignatory employer.⁷ This was calculated using the same 1-year formula

⁶ These facts are based on Wilhite's credible and unrefuted testimony as corroborated by his records. Indeed, Talbot admitted that Respondent received the faxed resignation at Respondent's office on February 13.

⁷ The General Counsel does not allege that the imposition of this fine was unlawful.

described above in Ganelli's case. Like Ganelli, Respondent also reconsidered Wilhite's fine. On September 21, Respondent advised Wilhite that it had reconsidered the matter and decided to fine him \$64,360.32. In its report the trial committee claimed that Wilhite had not resigned until April 12.⁸ The fine was based on the amount a journeyman would have earned for the 64-day period from February 8 to April 12. The committee decided that Wilhite should also be fined \$200 per year for his 18 years of service for each of the three sections of the constitution that he was charged with violating.

3. Thomas Whitcomb

Thomas Whitcomb had been a member of Respondent for about 25 years. He too began working for Ford on February 8; he too performed sheet metal work. By letter dated February 11, Respondent charged him with violating its constitution by working for a nonsignatory employer. The following Monday, February 15, Whitcomb went to Respondent's union office and spoke with Gambatese. Whitcomb asked for a withdrawal card, but Gambatese denied the request. Whitcomb had already prepared a resignation letter; he signed it and then handed it to Gambatese.⁹ On advice of counsel Whitcomb sent another resignation letter to Respondent on April 12.

Like the cases of Ganelli and Wilhite, Whitcomb was notified by Respondent that he had been fined for working for a nonsignatory employer. The amount of his fine was \$49,730.04.¹⁰ The fine was calculated using the same 1-year formula previously described. Whitcomb's fine was also reconsidered. On September 21, Respondent advised him that after reconsideration it decided to fine him \$67,960.32. Like Wilhite's case, Respondent claimed that Whitcomb had not resigned until April 12.¹¹ Respondent then calculated this fine on the same basis that it used in calculating Wilhite's reconsidered fine, but using Whitcomb's 24 years of service.

4. Ronald Apple

Ronald Apple had been a member of Respondent for about 11 years. Apple too began working for Ford on February 8 performing sheet metal functions. Like the others described above, Apple received notice from Respondent that he was charged with violating Respondent's constitution and bylaws by performing sheet metal work for a nonsignatory employer. On February 15, Apple called Gambatese and asked what he could do about the charges. Gambatese replied that there was nothing that Apple could do, that Apple could have resigned earlier but that now it was too late to resign; that Respondent's executive board would not accept his resignation at that point. Gambatese also commented that ignorance was no excuse. Apple testified that he did not submit his resignation to Respondent because of Gambatese's comments that it would be

⁸ Talbot testified that he overlooked Wilhite's earlier resignation letter.

⁹ These facts are based on Whitcomb's credible testimony. Talbot admitted that Respondent received Whitcomb's resignation letter on February 15.

¹⁰ The General Counsel does not allege that the imposition of this fine was unlawful.

¹¹ Talbot testified he also overlooked Whitcomb's earlier resignation letter.

futile to do so.¹² Apple did thereafter submit a written resignation to Respondent on April 12, after being advised by counsel to do so.

Like the cases above, Respondent notified Apple that he had been fined \$58,597.92 for working for a nonsignatory employer. This was based on the same 1-year formula as the others. Apple was also notified that his case was being reconsidered. Apple was then fined \$59,560.92. Respondent used the same formula in arriving at this amount. The trial committee report concluded that Apple had not resigned until April 12.

III. ANALYSIS

The General Counsel makes a narrow argument in this case. He does not assert that Respondent could not lawfully discipline members for accepting employment with a nonsignatory employer, and he does not challenge the amount of the fines assessed against the employees in this case. Nor does the General Counsel challenge the facial validity of any of the rules contained in Respondent's constitution. Rather, the General Counsel argues that the method Respondent used in calculating the fines was unlawful.

The Act does not generally forbid a labor organization from fining its members. *NLRB v. Allis-Chalmers*, 388 U.S. 175 (1967). However, labor organizations may not fine former members who have resigned for postresignation conduct. *Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Textile Workers Union Local 1029*, 409 U.S. 213 (1972). Moreover, Section 7 of the Act protects employees' right to resign from membership in a labor organization. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). The Board has held that the portion of a fine attributable to an employee's postresignation conduct violates the Act. *Newspaper Guild Local 3 (New York Times)*, 272 NLRB 338 (1984).

Turning first to Ganelli's case, Respondent cites *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), to support an argument that it need only show "some evidence" to justify Ganelli's fine. However, that case is clearly inapposite; it did not involve allegations of unfair labor practices that are within the exclusive jurisdiction of the Board to resolve. I have concluded above that Ganelli mailed his resignation letter to Respondent on February 2. Respondent is presumed to have received this letter the next day. *Pattern Makers (Michigan Model Mfgs.)*, 310 NLRB 929 (1993). Ganelli did not begin working at Ford until February 8. Because Ganelli resigned from membership before starting work at Ford, the fines imposed on him violated Section 8(b)(1)(A).

Turning next to Thomas' case, I have concluded above that Thomas did not resign until about 2-1/2 months after starting work for Daimler-Chrysler. However, Respondent used a formula in fining him that included a 1-year projection of the harm Thomas' employment there would have caused Respondent. This formula thus included a period of time after Thomas had resigned from membership. Respondent argues that its use of this formula is lawful because it amounted to an assessment of liquidated damages against Thomas and was not actually based on the amount of time Thomas had worked for Daimler-

Chrysler. However, while the formula may in fact be a liquidated amount of damages, the fact remains that the formula used to determine the damages included a period of time extending after Thomas' resignation. As such it violated Section 8(b)(1)(A). *Newspaper Guild*, supra. It follows that Respondent's lawsuit to compel payment of the fine also violated Section 8(b)(1)(A). *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985).

The cases of Wilhite and Whitcomb may be analyzed together. Respondent fined them for conduct that occurred up to April 21 although they had resigned in February. By doing so Respondent violated Section 8(b)(1)(A).

Finally, I address the case of Ronald Apple. I have concluded above that Respondent advised Apple on February 15 that it was too late for him to resign and it would not accept his resignation. The Board has held that an employee may be deemed to have constructively resigned from membership when a labor organization engages in conduct that reasonably creates the impression that actual resignation would be futile. *Machinists Local 1374 (Columbia Machine)*, 274 NLRB 123 fn. 1 (1984). I conclude that Respondent's comments to Apple clearly created the impression that his resignation would be futile. I shall therefore treat Apple as if he has resigned on February 15. Because Respondent thereafter fined Apple for conduct that occurred after his resignation, Respondent's conduct violated Section 8(b)(1)(A).

The Charging Party in Case 8-CB-9003 argues that the statements made by Respondent to the employees that they were not free to resign membership also violated Section 8(b)(1)(A), citing *Automotive & Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865 (1997). However, I find it unnecessary to resolve that issue because the General Counsel has not alleged those statements in the complaint and has not argued that they were unlawful in his posttrial brief. This Charging Party also argues that the second set of fines were unlawful because they served as a pretext to continue the earlier unlawful fines. However, here too the General Counsel fails to allege that matter in the complaint or make that argument in his brief and it is the General Counsel who controls that allegations in the complaint.

CONCLUSIONS OF LAW

1. By fining Anthony Ganelli, Brian Thomas, Robert Wilhite, Thomas Whitcomb, and Ronald Apple for conduct that they engaged in after they had resigned from membership, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By filing a lawsuit to compel Brian Thomas to pay the unlawful fine assessed against him, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having fined Anthony Ganelli for conduct

¹² These facts are based on Apple's credible testimony.

that he engaged in after he had resigned from membership, Respondent must rescind those fines and notify Ganelli in writing that it has done so.

I have concluded that Respondent fined Brian Thomas, Robert Wilhite, Thomas Whitcomb, and Ronald Apple for conduct that included a time after they had resigned from membership. The General Counsel and the Charging Parties argue these fines should be rescinded in their entirety as opposed to being apportioned between preresignation and postresignation conduct. I agree. I am aware that in certain cases the Board has required only that the fines be apportioned. See, e.g., *Newspaper Guild Local 3 (New York Times)*, 272 NLRB 338, (1984). However, I conclude that such cases are distinguishable from the instant case. They involved fines assessed for crossing a picketline and were therefore easily apportioned. Under these circumstances, I shall require that Respondent rescind all the fines imposed on Thomas, Wilhite, Whitcomb, and Apple and to notify each of them in writing that it has done so.

I have concluded that Respondent unlawfully instituted a lawsuit against Thomas to compel him to pay the unlawful fine. I shall order that Respondent cease and desist from maintaining that lawsuit. I shall further order that Respondent reimburse Thomas for all reasonable expenses and legal fees he incurred in defending against that lawsuit, with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991). Respondent argues that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), precludes the award of attorney's fees in this case because the General Counsel has failed to show that the lawsuit was without merit and was filed for a retaliatory purpose. I disagree. In that case the Supreme Court exempted from that analysis lawsuits that have an objective that it is illegal under Federal law. *Id.* at 737-738 fn. 5. Here, I conclude that the lawsuit Respondent filed against Thomas has an objective that is unlawful under the Act. *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985). Charging Party Thomas argues that he is also entitled to be reimbursed for expenses incurred in connection with the filing and prosecution of the unfair labor practice charge in this case. However, I do not regard Respondent's defenses in this case to be frivolous, and I therefore reject that argument.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Fining employees for conduct that they engaged in after they had resigned from membership.
 - (b) Filing and maintaining a lawsuit to compel payment of the unlawful fines.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the fines imposed on Anthony Ganelli, Brian Thomas, Robert Wilhite, Thomas Whitcomb, and Ronald Apple and remove any reference to those fines from its files, and within 3 days thereafter notify each of them in writing that it has done so.

(b) Reimburse Brian Thomas for all reasonable expenses and legal fees he incurred in defending against the lawsuit filed to compel payment of the fine, with interest.

(c) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members employed by the Ford Motor Company, Brookpark, Ohio, and Daimler-Chrysler Corporation, Perrysburg, Ohio, at any time since January 12, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 30, 2000

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice

¹⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fine employees for conduct that they engaged in after they had resigned from membership in our organization.

WE WILL NOT institute and maintain a lawsuit to compel payment of the unlawful fines.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the fines that we imposed on Anthony Ganelli, Brian Thomas, Robert Wilhite, Thomas Whitcomb, and Ronald Apple and remove any reference to those fines from our files, and WE WILL, within 3 days thereafter, notify them in writing that we have done so.

WE WILL reimburse Brian Thomas for all reasonable expenses and legal fees he incurred in defending against the lawsuit filed to compel payment of the fine, with interest.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 33 OF NORTHERN OHIO